86-149

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

FRANK PATROFF,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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QUESTIONS PRESENTED

1. Whether, in a criminal obscenity prosecution, the searching focus required under the First, Fourth, and Fourteenth Amendments to the Constitution of the United States for issuance of a search warrant is met where a search warrant affidavit contains only brief descriptions of sexual acts from the cover and from one or two pages of a magazine.

2. Whether, under the First and Fourteenth Amendments to the Constitution of the United States, the mere presence of a clerk in an adult bookstore during the execution of a search warrant is sufficient to impose criminal liability upon the clerk for the obscenity of the material seized.

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FRANK PATROFF,
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STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, entered on February 27, 1986.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, is reported at 141 Ill.App.3d 483, 490 N.E.2d 148 (1986). A copy of the opinion is included in the Appendix as Exhibit A.

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JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decision of the Illinois Appellate Court, Second District. A written opinion was issued by that court on February 27, 1986. Petitioner sought leave to appeal from the Illinois Supreme Court in a timely fashion. On June 3, 1986, the Illinois Supreme Court denied his petition for leave to appeal. A copy of the order denying leave to appeal is included in the Appendix as Exhibit B.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth, and Fourteenth Amendments to the Constitution of the United States and the Illinois Obscenity Statute, Ill.Rev.Stat. 1983, Ch. 38, ¶ 11-20, are set forth in the Appendix as Exhibits C and D.

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STATEMENT OF THE CASE

On June 27, 1983, at approximately 10:30 a.m., Timothy McCann, an investigator for the Kendall County State's Attorney, entered the Denmark Bookstore located at 1300 Business 30 West, Aurora, Illinois. Signs on the outside of the store indicated that a 50 cent browsing fee was required and that a person had to be 18 years of age to enter the store. The inside of the store contained a counter with a cash register. Situated around the walls and in the center of the store were racks containing in excess of 1,100 magazines and paperback books. In addition, there were motion picture films and video tapes in the store.

McCann approached the counter and paid the petitioner, Frank Patroff, $2.00 in browsing fees for himself and for 3 other persons who accompanied him. After petitioner gave McCann receipts for the fees, McCann and the other individuals walked around the store looking at magazines. McCann picked up 4 magazines from the right-hand wall, one at a time, and dictated a brief description from each of the magazines or its cover into a small tape recorder. Petitioner then asked McCann to leave, telling him he would refund the browsing fees.

McCann subsequently executed a complaint for search warrant. A copy of the complaint for search warrant is included in the Appendix as Exhibit E. The materials identified for seizure in the search warrant application were 4 magazines entitled "Wild Trio, Number 307", "Fuck Highway, Number 1", "Funky Girls, Number 1", and "Titans, 'Bullet Productions' ". McCann's description of the first and third named magazines referred only to the cover and two pages in the magazine. His reference to the second

named magazine was to the cover and one page of the magazine. Finally, McCann's reference to the last named magazine was only to the cover. McCann's description of the first magazine is fairly illustrative:

> Cover of said magazine depicting one male without pants lying supine with his penis inserted into a female subject vagina, while a second female licks the vaginal area of the first female.
>
> On page 8 of said magazine, one male subject lying supine with his penis inserted into the vagina of the first female with the second female was licking the vaginal area of the first female. On the following pages, the photographs of a female subject lying on a couch while a male subject inserts his penis into the first female vagina, while a second female subject licks the testicles of the male.

Without review of any of the magazines and relying solely on the complaint for search warrant and accompanying attachments, a state court judge issued a search warrant directing the seizure of the four named magazines. McCann then returned to the bookstore, where the petitioner was still present, and seized the four magazines.

On June 28, 1983, petitioner was arrested and charged with obscenity. A criminal complaint alleged that petitioner violated Ill.Rev.Stat. 1983, Ch. 38, ¶ 11-20, by offering obscene magazines for sale with knowledge of the content or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content of the magazines.

Prior to trial, petitioner filed a motion to quash search warrant, suppress items seized, and order return, asserting that the brief descriptions contained in the complaint for search warrant were constitutionally insufficient to allow

for a searching focus upon the question of obscenity. The trial court denied the motion to quash.

At the conclusion of the state's case in chief, the petitioner moved for a directed verdict, arguing that a finding of guilty would amount to the imposition of absolute criminal liability upon a clerk in an adult bookstore. The trial court denied the motion for directed verdict. After the petitioner stood upon his motion and presented no evidence, the jury returned a verdict of guilty on all counts.

The petitioner's timely post-trial motion was denied and he was sentenced to pay a fine of $910 plus court costs. The petitioner's post-trial motion preserved the constitutional issues relating to the sufficiency of the complaint for search warrant and relating to the imposition of absolute criminal liability.

The petitioner appealed to the Appellate Court of Illinois, Second District, and continued to assert the constitutional issues relating to the search warrant documents and the failure of the State's proof on the scienter element. On February 27, 1986, the Second District Appellate Court affirmed the petitioner's conviction.

A timely petition for leave to appeal was filed in the Illinois Supreme Court, again raising the same constitutional issues under the First, Fourth, and Fourteenth Amendments. The petition for leave to appeal was denied. The mandate of the Illinois Supreme Court has been stayed pending review by this court.

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REASONS FOR GRANTING THE WRIT

I.

AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT WHICH DESCRIBES SEXUAL ACTS FROM THE COVER AND FROM ONE OR TWO PAGES OF A MAGAZINE IS INSUFFICIENT TO PROVIDE THE SEARCHING FOCUS ON THE ISSUE OF OBSCENITY UNDER THE FIRST, FOURTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND WITHIN THE PRINCIPLES ARTICULATED IN NEW YORK v. P. J. VIDEO, INC., — U.S. —, 106 S.Ct. 1610 (1986).

In the term just completed, this Court addressed the issue of search warrant applications in the First Amendment context. *New York v. P. J. Video, Inc.*, — U.S. —, 106 S.Ct. 1610 (1986). This case presents an important question relating to warrant applications involving books and magazines which goes beyond the question resolved in *P. J. Video*. At the same time, the result in this case is in apparent conflict with the principles and reasoning of *P. J. Video*.

In *P. J. Video*, this Court reconfirmed the long recognized principle that special protection is to be given to books and films in the search and seizure area. Citing *Roaden v. Kentucky*, 413 U.S. 496 (1973), *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), *Marcus v. Search Warrant*, 367 U.S. 717 (1961), *Heller v. New York*, 413 U.S. 483 (1973), *Lee Art Theatre Inc. v. Virginia*, 392 U.S. 636 (1968), and *Stanford v. Texas*, 379 U.S. 476 (1965), this Court stated the following:

> We have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out.
>
> *New York v. P. J. Video, Inc.*, — U.S. —, 106 S.Ct. at 1614.

Among the protections mentioned was the opportunity of the magistrate issuing the search warrant to "focus searchingly on the issue of obscenity." — U.S. —, 106 S.Ct. at 1614.

These special protections or "special constraints" had also been recognized in the recent case of *Maryland v. Macon*, — U.S. —, 105 S.Ct. 2778 (1985), as well as the earlier case of *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326, n.5 (1979). *Macon* and *Lo-Ji* merely continued the Court's consistent concern for communicative items within the search and seizure process. This concern, of course, was reflected in *P. J. Video*.

In its opinion in *P. J. Video*, this Court held that because the special protections were adequate to protect First Amendment interests in the warrant process, the same general standard of probable cause used in other cases was also to be applied in cases involving First Amendment interests. That standard is whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." — U.S. —, 106 S.Ct. at 1616 (citing *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983)).

Upon reviewing the affidavit of the New York investigator in light of the articulated standard and in light of

the three part obscenity definition contained in the New York statute, this Court found that there was sufficient probable cause. In particular, the Court concluded that there was sufficient information in the affidavit to believe that there was a "fair probability" that the movies satisfied both the first and third elements of the statutory definition of obscenity. — U.S. —, 106 S.Ct. at 1616.

In reaching its conclusion, this Court relied on the dissenting opinion of Judge Jasen of the New York Court of Appeals. That opinion emphasized that the affidavit clearly stated the content and character of the movies. That opinion also relied on the titles of the films, the advertisements of each as adult cassette movies, plot, setting, and theme. It concluded that the affidavit reasonably allowed the magistrate to find that the described sexual acts pervaded the films.

The affidavits in this case fall far short of the affidavits sanctioned in *P. J. Video.* At most, the investigating officer in this case excerpted a cover and two pages of a magazine. At the least, he excerpted a description of a cover of a magazine. There is no indication regarding the length of the magazine, the existence of text, the advertising on the magazines, or the theme and content of the magazines. In short, there was nothing which would have allowed the judge to determine whether there was a fair probability that the average person, applying contemporary community standards, would find that the magazines appealed to a prurient interest in sex or whether, under the third part of the test applicable in Illinois, the magazines were utterly without redeeming social value (*People v. Ridens,* 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993 (1975)).

This Court applied the "fair probability" probable cause test in *P. J. Video* to all three elements of the tripartite definition of obscenity. In this case, there is no room to suggest that the probable cause finding is a dispute over a factual determination by a judge. There is literally nothing in the complaint for search warrant which would allow a judge to make any determination at all on the first and third elements of the definition of obscenity.

The decision of the Illinois Appellate Court is clearly in conflict with the principles of *Marcus* and its progeny, including *P. J. Video*. First Amendment concerns cannot tolerate probable cause determinations based upon reference to isolated depictions of sexual acts. Unless this question is resolved by this Court, the special protections accorded books, magazines, and films in the warrant process will have been dissipated. This Court should grant certiorari to clearly delineate the necessary parameters for search warrant applications in the First Amendment context.

II.

AN OBSCENITY CONVICTION OF AN ADULT BOOKSTORE CLERK BASED UPON THE CLERK'S MERE PRESENCE IS TANTAMOUNT TO THE IMPOSITION OF ABSOLUTE CRIMINAL LIABILITY, IN CONTRAVENTION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This case presents an important question of whether criminal liability for obscenity may be imposed upon a clerk in an adult bookstore where the clerk has neither sold nor attempted to sell the materials and is shown mere-

ly to have been present on the premises on several occasions. Resolution of the question is tied to the application of *Smith v. California,* 361 U.S. 147 (1959). The question itself touches upon the issue left unresolved in *Smith* concerning what sort of mental element is constitutionally required for a criminal obscenity conviction. *See Mishkin v. New York,* 383 U.S. 502, 509-510 (1966); *Ginsberg v. New York,* 390 U.S. 629, 644 (1968); *Hamling v. United States,* 418 U.S. 87, 121-123 (1974).

The evidence presented showed petitioner to be nothing more than a clerk in an adult bookstore. He took the browsing fees from the investigator and asked the investigator to leave after the investigator had selected four magazines and dictated a description into a small tape recorder. The petitioner was also present later in the day when the search warrant was executed. The only other evidence relating to petitioner's involvement was the investigator's testimony that he had seen the petitioner in various parts of the store on several prior occasions and that he knew the petitioner to be the manager of the store some eight months after the subject charges were filed.

In rejecting petitioner's argument that there was no proof of knowledge, the Illinois Appellate Court relied on the fact that the deputy had seen the petitioner present in various parts of the bookstore on several occasions and that the bookstore was an adult bookstore which contained magazines with explicit photographs, restricted admission, and charged a 50 cent browsing fee.

This Court has condemned the imposition of absolute or strict criminal liability in an obscenity case. *Smith v. California,* 361 U.S. 147 (1959). In reversing the convic-

tion of the proprietor of a bookstore, the *Smith* court discussed the policy reasons behind the scienter requirement:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

361 U.S. at 153-154 (Citations and footnotes omitted).

Although the opinion in *Smith* indicated that circumstantial evidence may be used to show the bookseller's knowledge of the contents of a book, it did not sanction drawing that inference in the case of a clerk by virtue of that clerk's mere presence in the bookstore. If such an inference could be drawn, the clerk would then be obligated to acquaint himself with the contents of every book in his employer's shop. Since that is not the employer's obligation, it must follow that it cannot be the clerk's obligation.

Perhaps the inference of knowledge can be drawn when a clerk sells a magazine which is presented directly to him and he views part of it. However, nothing less than absolute liability is imposed when, as in this case, the clerk is charged with merely offering magazines for sale and his closest connection to the subject magazines is being in the same building. The First and Fourteenth Amendments cannot sanction the imposition of such liability.

The decision of the Illinois Appellate Court is also in conflict with this Court's decision in *Vachon v. New Hampshire*, 414 U.S. 478 (1974). In *Vachon*, the operator of a store was charged with willfully contributing to the delinquency of a minor by selling or causing to be sold a button with obscene material on the button. After reviewing the record, this Court reversed the conviction of the defendant because there was no evidence indicating that the defendant personally sold the button or was aware of the sale. The defendant's conviction was reversed even though he had conceded that he operated the store.

First Amendment considerations did not form the basis of the Court's opinion in *Vachon*. Rather, the re-

versal occurred on due process grounds. This case not only presents similar circumstances, but presents them in a situation where First Amendment interests are implicated. If the operation of the store by the proprietor in *Vachon* was insufficient to satisfy the scienter element, the mere presence of the petitioner as a clerk in this case is insufficient to satisfy that element.

The decision of the Illinois Appellate Court is also in conflict with decisions of the highest courts of the states of Texas and Massachusetts on the issue of scienter. In *Davis v. State,* 658 S.W.2d 572 (Tex.Cr.App. 1983), the Court of Criminal Appeals of Texas, sitting *en banc,* held that the mere acts of allowing the business establishment to be open to the general public and giving of change did not provide sufficient direct or circumstantial evidence establishing that the defendant had knowledge of the character and content of the film at issue. The defendant was charged with promoting obscenity by exhibiting an obscene film, and had been present when an officer went into the bookstore, received change from the defendant, and watched the film in a viewing booth. The defendant was also present when the officer returned to seize the film pursuant to warrant several days later.

Subsequent to *Davis,* the Court of Criminal Appeals of Texas, once again sitting *en banc,* reversed the conviction of a manager of an adult bookstore for insufficient evidence. *Beier v. State,* 687 S.W.2d 2 (Tex.Cr.App. 1985). The defendant had cleared the cash register just prior to the purchase of a magazine by an undercover officer from a clerk and had a list of employees and instructions to clerks pertaining to vice investigations on his per-

son at the time of arrest. The defendant was charged with intentionally selling obscene material knowing the content and character of the material. The observation of the Texas court is particularly appropriate to this case:

> The opinion of the court of appeals comes dangerously close to authorizing appellant's conviction based upon proof of his status as the manager of an enterprise, so long as he knew that the enterprise had criminal potential. . . Under our law a person is not punished for his status, but for his conduct. See also *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (status offense violative of Fourteenth Amendment.) *Cf. Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968).
>
> 687 S.W.2d at 4-5.

In *Commonwealth v. Thureson,* 357 N.E.2d 750 (Mass. 1976), the defendant's conviction for disseminating an obscene film was reversed where, in her capacity as clerk, she had made change for the machine on which the film was viewed. She also admitted that she had "a pretty good idea" what was in the machines, but denied that she had ever viewed them. The Supreme Judicial Court of Massachusetts held that there was insufficient evidence to show that the defendant had seen or should have seen or otherwise had knowledge of the contents of the material. In *Commonwealth v. Rosenberg,* 398 N.E.2d 451 (Mass. 1979), the obscenity conviction of a part owner and manager of a variety store was reversed for lack of proof of scienter. The court found no proof of actual knowledge of the contents of the materials nor did it find any proof, circumstantial or otherwise, of constructive knowledge of the contents. This finding was made even though the defendant received the money for the magazine and the

magazine had been placed face up on the counter. However, the court found insufficient evidence to show that the defendant had looked at the cover.

In this case, petitioner has been convicted on nothing more than his status as a clerk in an adult bookstore. This holding is inconsistent with First Amendment principles articulated by this court and with decisions of the highest courts of other states. This Court should grant certiorari to resolve this important question.

CONCLUSION

Because the decision of the lower court is in conflict with decisions and principles announced by this Court and is in further conflict with decisions of the highest courts of other states, and because valuable First Amendment interests are at issue, this Court should grant a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, Second District.

Respectfully submitted,

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EXHIBIT A

No. 85-236

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
FRANK PATROFF,
Defendant-Appellant.

Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois

Honorable Wilson Burnell
Judge Presiding

(Filed February 27, 1986)

JUSTICE STROUSE delivered the opinion of the court:

Defendant, Frank Patroff, was charged in a four-count complaint with the offense of obscenity (Ill.Rev.Stat. 1983, ch. 38, par. 11-20(a)(1)) for the sale of four allegedly obscene magazines. Following a jury trial, defendant was found guilty and ordered to pay a fine of $910, plus costs. Defendant appeals.

On June 27, 1983, at approximately 10:30 a.m. Tim McCann, a deputy sheriff for the Kendall County sheriff and an investigator for the Kendall County State's Attorney's office, went to the Denmark Bookstore located at 1300 Business Route 30 in Aurora. The Denmark Bookstore was located in a two-story building, with the commercial premises on the first floor, and an apartment on the second. On the outside of the store were signs which indicated that a 50-cent browsing fee was required, and that a person must be 18 years of age to enter the store.

Inside the store was a counter with a cash register and merchandise for sale. Around the walls of a large room there were racks with a large number of magazines, and in the center of the room there were also racks and tables containing magazines and paperback books. There were perhaps 1,000 magazines and at least 100 paperback books located within this room, as well as motion picture films and video tapes.

McCann, who was accompanied by three other individuals, approached the counter, saw the defendant, and paid him $2 for browsing fees. The defendant gave him receipts for the browsing fees. McCann and the other individuals then walked around the store looking at magazines. On the right-hand wall McCann focused upon four magazines in the middle of the wall, picked them up one at a time, and dictated a description of an excerpt from each of the magazines into a hand-held tape recorder. The defendant then approached McCann and asked him to leave and offered to refund the browsing fees.

McCann thereafter returned to the Kendall County courthouse, where a complaint for search warrant and supporting affidavit were prepared. The affidavit described McCann's law enforcement authority as well as the location of Denmark Bookstore, and indicated that on June 27 he had entered the bookstore and inspected magazines that were on display, including magazines identified by content on an attached exhibit B, which recited:

> "Magazine entitled Wild Trio, number 307. Cover of said magazine depicting one male without pants lying supine with his penis inserted into a female subject vagina, while a second female licks the vaginal area of the first female.

On page 8 of said magazine, one male subject lying supine with his penis inserted into the vagina of the first female with the second female was [*sic*] licking the vaginal area of the first female. On the following pages, the photographs of a female subject lying on a couch while a male subject inserts his penis into the first female vagina, while a second female subject licks the testicles of the male.

Magazine entitled Fuck Highway, number 1. Cover of said magazine depicting the penis of a male subject being inserted into the anus of a female while said female holds her fingers in her vaginal area. On the third page of said magazine, photograph of a male subject in the front seat of a car who is kissing a female subject while a second female subject inserts the penis of the male subject into her mouth with the first female subject having her breast and her panties exposed.

Magazine entitled Funky Girls, number 1, 'MGN', Cover of said magazine depicting the insertion of a tan prostheltic [*sic*] device into the vaginal area of a female. Sixth page of said magazine depicting one female subject lying on a blanket, while a second female subject inserts her tongue into the vagina of the first female, one female having her nude breast exposed. Eighteenth page of said magazine showing the female licking the anus of a second female while the first female holds the lips of the first females vagina open.

Magazine entitled Titans, 'Bullet Productions', Cover of said magazine depicting one male subject lying supine while a second naked male subject has inserted the penis of the first male subject into his mouth while a third male subject inserts his penis anally into the second male subject."

The complaint for search warrant sought authority to seize the magazines described in exhibit B.

Deputy McCann took the search warrant documents to Judge James Wilson in Aurora, who reviewed the docu-

ments and issued a search warrant calling for the seizure of the four magazines. Later that same day, McCann returned to the Denmark Bookstore and executed the search warrant, taking into his possession four magazines entitled "Wild Trio", "Fuck Highway", "Funky Girls", and "Titans". On June 28, 1983, a criminal complaint charging defendant with obscenity was filed, and defendant was arrested and released on bond. An amended complaint was subsequently filed charging one count of obscenity for each of the four magazines.

Following a jury trial in which Deputy McCann was the sole witness, defendant was found guilty of all four counts. His post-trial motion was denied, and he was ordered to pay a fine of $910, plus costs.

Defendant first contends that the affidavit for the search warrant was insufficient to provide probable cause for a finding that the magazines were obscene. Essentially, defendant argues that the judge could not possibly make a determination of probable cause because the affidavit provided him with only a "brief and excerpted description of sex acts" and he had no way of knowing how the described sex acts relate to the magazine as a whole.

The issuing judge did not view the magazines and the sole basis for the issuance of the search warrant was the description of the magazines contained in exhibit B which was appended to the affidavit. The question is whether the search warrant affidavit provides sufficient information to support a finding of probable cause as to the obscenity of the material.

In actng upon a complaint for a search warrant calling for the seizure of allegedly obscene materials, the issu-

ing judge is guided by a standard of probable cause. The test for probable cause is governed only by common sense and the practical considerations of everyday life. *(People v. Hobbs* (1978), 59 Ill.App.3d 793, 799). The issuing judge must weigh the totality of all the facts before him in determining whether there is sufficient evidence to justify probable cause that an item is obscene. (See 59 Ill.App. 3d 793, 799; see also *People v. Foote* (1982), 104 Ill.App. 3d 581, 583-84.) However, the judicial officer issuing the search warrant is not required to view the material to be seized in order to establish probable cause, as long as the supporting affidavit is specific and explicit and not merely conclusional. See 59 Ill.App.3d 793, 799.

In *People v. Hobbs* (1978), 59 Ill.App.3d 793, 799, relied upon by both parties, certain films were seized pursuant to a search warrant. The supporting affidavits described various scenes from the films which the police officer had viewed by way of coin-operated movie projectors in booths. The descriptions contained in the affidavits each consisted of several sentences setting forth the participants in the film and their activities in several scenes. 59 Ill.App.3d 793, 795-97.

In appealing their convictions, defendants argued, *inter alia*, that the search warrant affidavits were insufficent to give the issuing judge probable cause to believe that the films were obscene, because the affidavits did not specify the length of the films. The court rejected this argument, holding that the length of the film was not an essential element of the affidavit and that the description of the scenes of the films provided a factually sufficient basis for the judge to make his own determination on the

question of obscenity prior to issuing the search warrants. 59 Ill.App.3d 793, 799; accord *People v. Foote* (1982), 104 Ill.App.3d 581, 583-84.

Defendant in the present case makes the same argument maintaining that Exhibit B "provides no information regarding the length of the magazines, the continuity of the described sex acts throughout the magazine, the context of the sex acts, including accompanying text if any, the theme or plot of the magazine or lack thereof, and the description of articles or stories unrelated to the photographs if, indeed, any were present." He claims these cursory descriptions indicate only the *possible* obscenity of the magazines and they provide no information to assist in determining whether or not the magazines are obscene.

In deciding whether a search warrant should be issued, the issuing judge need not determine whether the materials in question are, in fact, obscene beyond a reasonable doubt; rather, the question is whether there existed probable cause to believe they are obscene. See *People v. Hobbs* (1978), 59 Ill.App.3d 793, 799.

The affidavit for the search warrant in the present case contained sufficient information from which the trial judge could find probable cause to believe these magazines were obscene. The elements which defendant claims were lacking (the length of the magazines, the context and continuity of the sex acts, and the accompanying text) are not essential to the probable cause determination in this case.

Defendant further argues that there is insufficient evidence to show that he offered these magazines for sale. We find this argument ill-founded, in light of the following relevant facts: the store had a sign advertising it as

the Denmark Bookstoore and other signs about contents; the defendant was the only person in the store except for customers; books, magazines and films were arranged for sale and were high priced; defendant was the only person at the cash register; defendant accepted the browsing fee which would be credited to purchases; and defendant was in a position to offer a refund.

Defendant next argues that the State failed to prove that he had the requisite scienter for a charge of obscenity. He maintains he was merely an employee of the bookstore, as opposed to an owner or operator, and therefore he must be found to have more direct involvement with the operation of the store than mere presence. Otherwise, he argues, bookstore employees such as himself would be subject to absolute criminal liability.

The State responds that it provided adequate proof that defendant knowingly offered obscene magazines for sale by demonstrating that the store stocks only adult materials, that it charges a browsing fee, that it restricts admission to adults, that the magazines are high-priced, and that defendant asked Deputy McCann to leave the store and offered to return the browsing fee after he saw McCann dictating descriptions of the contents of the magazines into a hand-held tape recorder.

The obscenity statute provides that a person commits obscenity when "with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he * * * offers or agrees to sell, deliver or provide any obscene writing [or] picture * * *." (Ill.Rev.Stat. 1983, ch. 38, par. 11-20(a)(1).) This element of scienter

must be proved by the State. *People v. Anderson* (1985), 130 Ill.App.3d 318, 327; see *Smith v. California* (1959), 361 U.S. 147, 153, 4 L.Ed.2d 205, 211, 80 S.Ct. 215, 218.

Defendant was charged with offering the four obscene magazines for sale "with knowledge of the content thereof or recklessly having failed to exercise reasonable inspection which would have disclosed the nature or content of [each] obscene magazine." He maintains his conviction should be reversed because he was not shown to have the requisite scienter regarding the sale of obscene materials as mandated by the statute. Defendant relies solely on *People v. Hart* (1981) 101 Ill.App.3d 343, in support of this position.

In *Hart,* the defendant was a clerk in an adult bookstore in Rockford. A police officer entered the bookstore and asked defendant for $5 worth of quarters. He then asked her if the movies in a back room were any good, to which she responded she did not know. He watched three movies in an arcade (a separate room located 30 feet from the defendant), then browsed through the store. The store, which restricted admittance to adults, was filled with racks holding hundreds of magazines and paperback books, as well as miscellaneous sexual novelties. As the police officer was leaving the store, he again engaged the clerk in conversation, in which she advised him that some of the films available for sale at the counter might be the same as some of the films in the arcade. The films the officer viewed were ultimately seized by warrant, and the defendant clerk was arrested and charged with obscenity.

On appeal, Hart claimed that she had neither "made available for public viewing" the films in question, nor

possessed the requisite scienter, that is, that she "knew the nature or content or recklessly refused to exercise reasonable inspection of the nature or content" of the charged film. In response, the State argued that the circumstances describing the environment of the bookstore and the reported conversations of the defendant suggested an inference that she had the requisite scienter and was responsible for the dissemination of the films.

This court specifically rejected the State's contentions and reversed defendant's conviction, concluding that the State failed to prove the element of scienter without which absolute criminal liability for obscenity would be imposed. The court held that the evidence did not establish that defendant knew which movies the officer was going to choose out of 36 possible choices, nor that the other 33 movies were obscene. 101 Ill.App.3d 343, 351.

The evidence in the case at bar establishes that when Deputy McCann went to the Denmark Bookstore on June 27, 1983, there were signs mounted on the front door of the store stating that there is a browsing fee of 50 cents and that one must be at least 18 years old to enter the store. When McCann entered the store, defendant was at the cash register. McCann identified certain photographs depicting the interior of the store. The photos reveal that the stock of the store is exclusively related to sexually-oriented materials, and the details of such sexual conduct can be clearly seen on the covers of most of the magazines in the photos.

When asked if he knew defendant's status with regard to the management of the store, McCann stated that he knew approximately eight months later, on February 8,

1984, that the defendant was the manager of the store. On several occasions prior to June 27, 1983, McCann had seen the defendant in various parts of the store including the service counter and the general sales area of the store.

We find *Hart* to be factually distinguishable from the present case. In *Hart,* no evidence was presented that the defendant had knowledge of the contents of any of the films or that she had ever been in the arcade where the films were shown. To the contrary, defendant in the present case had been seen in various parts of the bookstore by Deputy McCann on several occasions. Moreover, the evidence clearly demonstrates that the bookstore contained, ***inter alia,*** hundreds of magazines with explicit photographs on the covers. Additionally, the magazines were very high priced and the store restricted admittance to individuals 18 years of age or older and charged a 50-cent browsing fee, as indicated by a sign on the outer door.

This evidence was sufficient, if believed by the jury, to find that defendant knowingly offered obscene magazines for sale. These factors are indicative of the requisite scienter. (See *People v. Pope* (1985), 138 Ill.App.3d 726, 742.) It is beyond reason that defendant did not know or have reason to know the nature or content of the magazines in question. Since even casual examination of an obscene magazine cover is sufficient to establish a violation of the obscenity statute (138 Ill.App.3d 726, 742), we conclude the State provided adequate proof that defendant knowingly offered obscene magazines for sale.

Defendant's final contention is that the Illinois obscenity statute (Ill.Rev.Stat. 1983, ch. 38, par. 11-20) is unconstitutional because it is vague and overbroad and

includes material that would appeal to lust alone which would appeal to the normal curiosity of an adult about sexual matters. Defendant primarily bases his contention on the recent case of *Brockett v. Spokane Arcades, Inc.* (1985), — U.S. — , 86 L.Ed.2d 394, 105 S.Ct. 2794.

The State's position is that *Brockett* has no constitutional implication for the Illinois obscenity statute (Ill. Rev.Stat. 1983, ch. 38, par. 11-20) and that the statute is not unconstitutional for using an incorrect definition of purient interest.

The Illinois Supreme Court has consistently upheld the constitutionality of the Illinois obscenity statute. (See, *e.g., People v. Ward* (1976), 63 Ill.2d 437, 440-41; *People v. Pope* (1985), 138 Ill.App.3d 726, 734.) In particular, the court has rejected the arguments that the statute is unconstitutionally vague or overbroad *(People v. Ridens* (1974), 59 Ill.2d 362, 372), as defendant here argues. Thus, the remaining question for this court is whether the Illinois obscenity statute is unconstitutional because it prohibits material that would appeal soley to lust which is a normal curiosity about sexual matters.

In *Brockett v. Spokane Arcades, Inc.* (1985), — U.S. — , 86 L.Ed.2d 394, 105 S.Ct. 2794, the Supreme Court reviewed a Washington obscenity statute which has been held unconstitutional by the Court of Appeals for the Ninth Circuit. Within the statutory definition of obscenity, "prurient" was defined as "that which incites lasciviousness or lust." (Wash.Rev.Code sec. 7.48A.010.(8) (1983).) The court of appeals held that by including "lust" in the definition of "prurient", the statute's reach extended to constitutionally protected material that mere-

ly stimulated normal sexual responses. Accordingly, the court held the entire statute to be unconstitutionally overbroad. — U.S. — , 86 L.Ed.2d 394, 400, 105 S.Ct. 2794, 2797.

The Supreme Court reversed on the basis that the court of appeals erred in striking down the statute in its entirety rather than in part, and that it should have found only the definitional section of the statute unconstitutional. The court did, however, agree with the court of appeals that the term "lust" could refer to a normal sexual curiosity and, therefore, could not be a definition of prurient interest. — U.S. — , — , 86 L.Ed.2d 394, 406, 105 S.Ct. 2794, 2802.

We conclude *Brockett* has no constitutional implications for the Illinois obscenity statute which defines prurient interest as "a shameful or morbid interest in nudity, sex or excretion" (Ill.Rev. Stat. 1983, ch. 38, par. 11-20 (b)). In fact, the *Brockett* court defined prurience for the purposes of identifying obscenity as "that which appeals to a shameful or morbid interest in sex." (— U.S. — , —, 86 L.Ed.2d 394, 406, 105 S.Ct. 2794, 2802.) Accordingly, defendant's reliance on *Brockett* is misplaced, and his argument that the Illinois obscenity statute is unconstitutional under the guise of *Brockett* is meritless.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

NASH, P. J., and REINHARD, J., concur.

EXHIBIT B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDNG
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 3, 1986

Mr. John Steven Beckett
Reno, O'Byrne & Kepley
501 West Church St.
Champaign, Ill 61280

No. 63327—People State of Illinois, respondent, v. Frank Patroff, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1986.

EXHIBIT C

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT D

Illinois Obscenity Statute,
Ill.Rev.Stat. 1983, Ch. 38, ¶ 11-20

11-20. Obscenity.

§ 11-20 Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, of recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed:

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing mutiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other specific justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT E

COMPLAINT FOR SEARCH WARRANT

(Filed June 27, 1983)

83-MR-13

Timothy McCann, Complainant, being first duly sworn on oath, now appears before the undersigned Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois, and requests the issuance of a Search Warrant to search the person or place as follows: Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein and seize the instruments, articles or things which have been used in the commission of, of which constitute evidence of, the offense of OBSCENTIY [sic]. Said instruments, articles or things being described as follows: Magazines, the exact list and description which is attached hereto as Exhibit "B".

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and/or place set forth above: See attached affidavit of Timothy McCann as adopted and incorporated herein.

/s/ Timothy McCann
Complainant

Subscribed and sworn to before me,
this 27th day of June, 1983.

EXHIBIT A

(Omitted)

EXHIBIT B

Magazine entitled Wild Trio, number 307, Cover of said magazine depicting one male without pants lying supine with his penis inserted into a female subject vagina, while a second female licks the vaginal area of the first female.

On page 8 of said magazine, one male subject lying supine with his penis inserted into the vagina of the first female with the second female was [sic] licking the vaginal area of the first female. On the following pages, the photographs of a female subject lying on a couch while a male subject inserts his penis into the first female vagina, while a second female subject licks the testicles of the male.

Magazine entitled Fuck Highway, number 1. Cover of said magazine depicting the penis of a male subject being inserted into the anus of a female while said female holds her fingers in her vaginal area. On the third page of said magazine, photograph of a male subject in the front seat of a car who is kissing a female subject while a second female subject inserts the penis of the male subject into her mouth with the first female subjects having her breast and her panties exposed.

Magazine entitled Funky Girls, number 1, "MGN", Cover of said magazine depicting the insertion of a tan prostheltic [sic] device into the vaginal area of a female. Sixth page of said magazine depicting one female subject lying on a blanket, while a second female subject inserts her tongue into the vagina of the first female, one female

having her nude breast exposed. Eighteenth page of said magazine showing the female licking the anus of a second female while the first female holds the lips of the first females vagina open.

Magazine entitled Titans, "Bullet Productions", Cover of said magazine depicting one male subject lying supine while a second naked male subject has inserted the penis of the first male subject into his mouth while a third male subject inserts his penis anally into the second male subject.

STATE OF ILLINOIS)
) SS.
COUNTY OF KENDALL)

Timothy McCann, being first duly sworn deposes and says as follows:

1. That this affiant is an investigator for the Kendall County State's Attorneys office and is empowered as a Deputy Sheriff for the County of Kendall.

2. That this affiant is familiar with a business being conducted on 1300 Business 30, Aurora, Oswego Township, Illinois, known as Denmark Bookstore and situated on the following described premises: See Attached Exhibit "A".

3. That on the 27th day of June, 1983, I entered the Denmark Bookstore and while in the store inspected magazines on display for sale to the public.

4. That among the magazines which I inspected was the following magazines describing the content thereof, to-wit: See Attached Exhibit "B".

5. That I have personal knowledge of the foregoing facts and that if called I could give competent testimony.

Further affiant sayeth not.

/s/ Timothy J. McCann

Subscribed and sworn to before me, this 27th day of June, 1983.

/s/ James M. Wilson, Judge